In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

Appeal from the United States Three Judge District Court for the District of Arizona

Opposition to Motion to Dismiss or Affirm

MITCHEL D. PLATT
PLATT & PLATT
P. O. Box 398
St. Johns, Arizona 85936
Telephone: (602) 337-4932
Counsel for Appellants

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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ARGUMENT IN OPPOSITION

I. Preface.

This case was docketed April 27, 1976. A Motion to Dismiss or Affirm was filed on June 14, 1976 by some of the individual appellees. The United States requested an extension of time to respond to the Jurisdictional Statement which extension was granted. However, the United States failed to file a response by the July 14th deadline. Therefore, this reply brief is directed only to the individual appellee's Motion to Dismiss or Affirm. Appellants reserve

the right to reply to or move to strike as untimely any United States response.

II. Tribal Indians Are Not Citizens.

The appellees' examination of the Fourteenth Amendment as it relates to the citizenship of *tribal* Indians is entirely too superficial. The Fourteenth Amendment and Indian voting rights must be examined with the same historical analysis engaged in by this court in *Richardson v. Ramirez,* 418 U.S. 24 (1976).

A close study of the congressional hearings held prior to the adoption of the Fourteenth Amendment entirely refutes appellees contentions in their Motion to Dismiss or Affirm. A thorough analysis of the lengthy discussions reported in the congressional record relative to Indian citizenship is more appropriately reserved for briefs and oral argument. However, a few references demonstrate that it was the very clear intent of all congressmen who debated the proper language of the Fourteenth Amendment that tribal Indians be excluded from citizenship—the only debate was what language best accomplished that result. *The Congressional Globe,* 39th Cong., 1st sess. (1866) pp. 498-507, 2890-2897. For instance, Senator Doolittle stated:

> "Mr. President, the Senator from Michigan declares his purpose to be not to include these Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them; . . . *"The Congressional Globe,* 39th Cong., 1st sess. (1866) p. 2895-2896.

Furthermore, the phrase "excluding Indians not taxed" in the amendment unquestionably referred to Indians not subject to *state property taxes.* No congressmen contended otherwise. *The Congressional Globe,* 39th Cong., 1st sess.

(1866) pp. 2890-2897. Even Senator Turnbull, who opposed putting this wording in Section One of the Fourteenth Amendment, accepted the language as referring to state property taxes when he stated:

> "If you introduce the words 'not taxed', that is a very indefinite expression. What does 'excluding Indians not taxed' mean? You will have just as much difficulty with those Indians that you say are in Colorado, where there are more Indians than there are whites. *Suppose they have property there and it is taxed;* then are they citizens?" *The Congressional Globe,* 39th Cong., 1st sess. (1866) p. 2893.

To suggest, as appellees do, that federal income taxes are taxes referred to by this phraseology in the Fourteenth Amendment is absurd since the Sixteenth Amendment to the Constitution permitting a federal income tax was not enacted for 45 years after the Fourteenth Amendment became law.

Clearly a thorough study of the intentions of those who wrote the Fourteenth Amendment is required before Tribal Indians are perfunctorily granted citizenship. In not a single case cited by the appellees has a court undertaken this fundamental examination of the meaning of citizenship under the Fourteenth Amendment as it relates to Tribal Indians.

III. The Tribal Indians Participation in Running a Government to Which They Owe No Allegiance Does Deprive the Non-Indian of Constitutional Guarantees.

The appellants' concern that they are deprived of due process of law and equal protection of laws if Tribal Indians vote in Apache County elections is not premature. As evidenced by Appendix A, the federal court since this appeal was filed has in fact positioned two and part of the

third supervisorial district entirely on the Navajo Reservation. Thus, it is a foregone conclusion that Tribal Indians shall control two (and may control all three) board seats. The Navajo will thereby impose taxes to which he is not subject, enact law to which he owes no allegiance and be immune from certain legal sanctions that govern the potential non-Indian board member.

The appellees misconceive the real issue. It is fundamentally and inherently unconstitutional and undemocratic that any person should exercise any degree of control over the laws of a government to which he is not subject. A single vote is important. Consequently, every vote cast in an election by a voter who is not subject to the laws of that government thereby diminishes the effectiveness of the vote of those who are subject to the laws and taxes.

The appellees' argument is tantamount to saying that one may be deprived of his voting rights if his vote would not change the outcome of the election.

The appellees speculate that state remedies may be available, but they cite none, and appellants are aware of no other remedy. Appellants only wish there were other remedies.

The appellees' contention that a total county tax levy is limited to $2.00 per $100 assessed valuation under A.R.S. § 11-251(12) is absolutely wrong. That limit is on only the "general current expenses". In addition to that tax the county may levy for special general purposes, road works, public works, teachers retirement, junior college tuition and many other purposes which are not subject to the $2.00 limit. Indeed, this past year the county tax levy exceeded $2.00 because of these other non-restrictive levys. There is no reason why a Navajo Board of Supervisors

cannot and would not effect a tax rate of $45.00 per $100 valuation as was done this past year in an Apache County reservation grade school district where the school board is dominated by non-taxpaying Navajos. This action was the subject of extensive litigation. *Kerr-McGee Corp. v. Chinle School District, et al.* (Maricopa County C-324239); *Navajo Communications Co., Inc., et al. v. Apache County, et al.*, Ariz. Fed.Ct. Civ. 75-740 PCT WEC.

Appellees assert that even though the reservation Indians have no stake in the responsibilities imposed by Apache County, they do have a stake in receiving the services of Apache County. However, the Supreme Court has already recognized in *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 690-91 (1965) that Arizona and its subdivisions are not obligated to service the reservation. The Court stated:

> "and in compliance with its treaty obligations the federal government has provided roads, education and other services needed by Indians, . . . *and since federal legislation has left the state with no duties or responsibilities respecting the Reservation Indians,* we cannot believe that congress intended to leave the state the privilege of levying this tax." (emphasis supplied).

The appellees have cited a couple of cases representing a minority viewpoint involving instances where a state may have jurisdiction over a tribal Indian. It is sufficient to note that the Supreme Court has not approved these ruling and would have to deviate greatly from its prior rulings on state court jurisdiction over Indians to do so. Also, even if the cases cited by appellees were the law, they do not cover most of the potential wrongs mentioned at page 20 of the Jurisdictional Statement which may exist if Tribal Indians participate in county government.

It is essential that these issues be examined closely by the court after full briefing and oral argument.

Respectfully submitted,

MITCHEL D. PLATT
PLATT & PLATT
P. O. Box 398
St. Johns, Arizona 85936
Counsel for Appellants

(Appendix Follows)

Appendix A

LODGED May 12 1976
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James M. Schermerhorn
Roger A. Schwartz
Attorneys
Civil Rights Division
Department of Justice
Washington, D. C. 20530
202/739-4381

In the United States District Court
for the District of Arizona

Leslie E. Goodluck, *et al.*, Plaintiffs, v. Apache County, *et al.*, Defendants.	Civ. 73-626-PCT (WEC)
United States of America, Plaintiff, v. State of Arizona, *et al.*, Defendants.	Civ. 74-50-PCT (WEC)

ORDER ADOPTING REAPPORTIONMENT PLAN OF PLAINTIFF UNITED STATES OF AMERICA

On September 16, 1975, this Court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, issued its Opinion and Judgment in the consolidated cases captioned above. On February 19, 1976, this Court issued

an Order implementing the provisions of its Opinion and Judgment of September 16, 1975. On March 22, 1976, this Court issued a Supplemental Post-Tribal Order amending and modifying, *nunc pro tunc*, its Order of February 19, 1976, and further implementing the provisions of its Opinion and Judgment of September 16, 1975.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The reapportionment plan of Defendant Apache County is rejected on the grounds that it fails to conform to the standards set out in *Baker v. Carr*, 369 U.S. 186 (1962); *Avery v. Midland County*, 390 U.S. 474 (1968); the Fourteenth and Fifteenth Amendments to the Constitution of the United States; the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, *et seq.;* and 42 U.S.C. §§ 1971 (a)(1) and (a)(2) A.

2. Reapportionment Plan "B" of Plaintiff United States of America, apportioning the Apache County Board of Supervisors Districts as follows: District 1—Chinle, Cottonwood, Dinnehotso, Lukachukai, Many Farms, Mexican Water, Red Rock, Rock Point, Rough Rock, and Teec Nos Pos Precincts (Total Population 10,600); District 2—Ft. Defiance, Ganado, Klagetoh, Nazhni, Sawmill, Steamboat, Wheatfields, and Wide Ruins Precincts (Total Population 11,355); District 3—Alpine, Concho, Eager, Greer, Lupton, McNary, Nutrioso, Puerco, Springerville, St. Johns, and St. Michaels Precincts (Total Population 10,343); is found to conform to the standards set out in Paragraph One of this Order, and is hereby adopted by this Court.

3. Defendants are hereby ordered to implement Reapportionment Plan "B" of Plaintiff United States of America immediately and to conform all Apache County District and Precinct lines to said plan within Thirty (30) days of this Order. Further, the Defendants are hereby enjoined

from conducting any and all phases of the election for the Apache County Board of Supervisors, including, but not limited to, filing and/or qualifying, and conducting the primary and general election, until such time as the terms of this Order are fully complied with. At that time and upon motion of any of the parties, this Court shall consider whether any additional affirmative relief is required to fully implement this Court's Order, Opinion, and Judgment.

Dated this 24th day of May, 1976.

Walter E. Craig
Judge Craig, District Judge